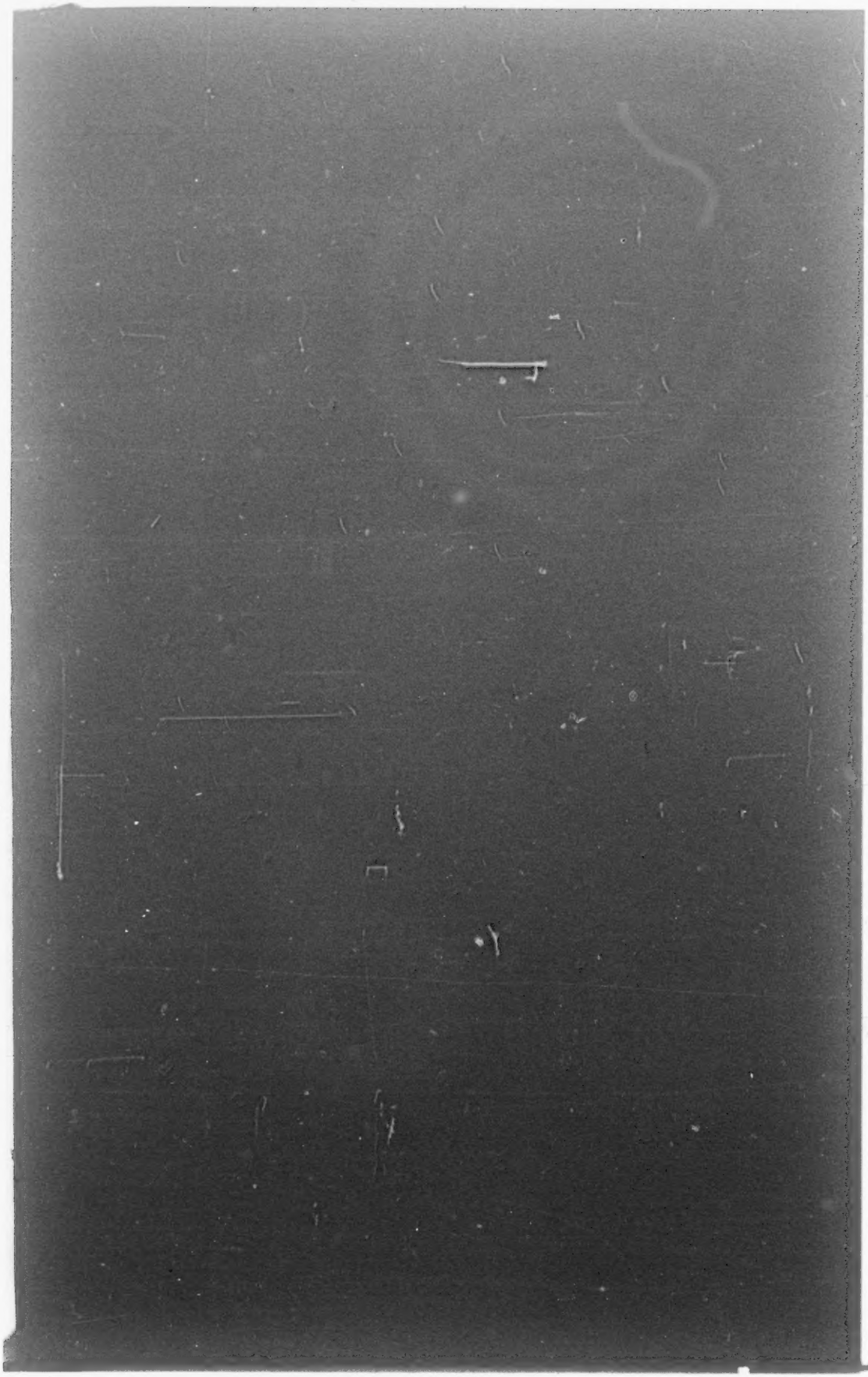


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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 647

BATES MANUFACTURING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 11–13) is reported at 19 F. Supp. 526. The opinion of the Circuit Court of Appeals (R. 19–29) is not yet officially reported.

JURISDICTION

The judgment of the court below was entered on December 8, 1937. (R. 30.) The petition for writ of certiorari was filed December 24, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Febuary 13, 1925.

QUESTION PRESENTED

Whether an action against the United States brought in the United States District Court to recover taxes illegally collected is "begun" within the meaning of Section 3226 of the Revised Statutes, as amended, when a petition is filed with the clerk of the District Court.

STATUTES INVOLVED

The statutes involved are printed in the Appendix to the petitioner's brief, pp. 12–14.

STATEMENT

The only question presented by the petition for writ of certiorari is whether the instant action, which is a suit to recover income and profits taxes alleged to have been illegally assessed and collected from the petitioner for the years 1917 to 1921, inclusive, in the aggregate sum of $313,249.71, was timely brought.

This action was brought in the United States District Court for the District of Massachusetts. From the allegations of the petition filed with that court (R. 1–7) it appears that the taxes in controversy were duly paid, that the Collectors of Internal Revenue who collected such revenue were not in office at the time the petition was filed, and that the claims for refund, upon which the suit is based, were seasonably filed and were rejected by the Commissioner of Internal Revenue on March 22, 1927.

On March 21, 1929, the petitioner filed the petition in question in the office of the clerk of the United States District Court for the District of Massachusetts. (R. 1.) On March 25, 1929, a copy of the petition was served by the attorney for the petitioner upon the United States Attorney for the District of Massachusetts. (R. 7.) On the same day, March 25, 1929, a copy of the petition and notice of its filing were sent by registered mail to the Attorney General of the United States. (R. 7–8.) On March 28, 1929, an affidavit of service and mailing of the petition and notice was filed with the District Court. (R. 7.)

On May 16, 1929, the United States by its attorney, the United States Attorney for the District of Massachusetts, filed an answer denying every material allegation of the petition. (R. 8.) On January 2, 1932, the petition was dismissed without prejudice for lack of prosecution. (R. 8–9.) On May 28, 1935, a bill of review having been filed and allowed, the case was restored to the docket. (R. 9.) On May 4, 1937, the United States filed a motion to dismiss the petition on the ground that the District Court was without jurisdiction to hear and determine the cause, it being alleged that the action was barred by the provisions of Section 3226 of the Revised Statutes as amended by Section 1113 (a) of the Revenue Act of 1926. (R. 9.) On June 18, 1937, the court granted the motion to dismiss and a judgment of dismissal was entered on July

20, 1937. (R. 10.) An appeal was taken to the Circuit Court of Appeals for the First Circuit from the order of dismissal (R. 10–11, 13–15), and was affirmed by that court in an opinion filed December 8, 1937, one judge dissenting. (R. 19–29.)

ARGUMENT

The principal reason advanced by the petitioner in support of its application for a writ of certiorari is that the particular question involved is an important question of Federal law which has not been, but which should be, settled by this Court (Br. 4–7).

We submit that the question involved is not of such general importance as the petitioner contends. The provisions of the Tucker Act, c. 359, 24 Stat. 505, here involved, have been in effect since March 3, 1887. However, the precise question presented by this petition has arisen in only a very few isolated cases, none of which, with the exception of *Walton* v. *United States,* 73 F. (2d) 15 (C. C. A. 8th), appears to have reached the appellate courts.

Further, if the Rules of Civil Procedure for the District Courts of the United States are adopted as proposed by the Advisory Committee on Rules for Civil Procedure, appointed by this Court, the question will probably not arise in the future. See Rules 3 and 4 in the draft of April 1937, together with the amendment of Rule 4 by the final report of November, 1937.

The petitioner further asserts (Br. 7–8) that the decision below is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Walton* v. *United States, supra.* We submit there is no direct conflict. As pointed out by the court below, the *Walton* case, *supra,* "reached the correct result, but by a wrong course of reasoning". (R. 25.) The result reached in the *Walton* case, *supra,* and in the instant case is the same. Each involves the provisions of the Tucker Act, *supra.* In each case the petition was filed with the United States District Court prior to the expiration of the period for bringing suit. In each case, also, a copy of the petition was served upon the United States Attorney and a copy mailed to the Attorney General after expiration of that period. In the *Walton* case the court recognized that the United States is immune from suit except where it has given its consent to be sued, and that when the United States has consented to be sued the procedure prescribed by Congress must be strictly followed in order to give the courts jurisdiction. It mistakenly, as we believe, held that the Tucker Act does not specify the time when an action is commenced against the United States, but by applying the law of South Dakota, the district wherein the action was brought, held that "the time of the service of a copy of the petition upon the United States District Attorney should determine the time when the action was commenced". *Id.,* p. 18.

Petitioner argues that the reasoning of the court in the *Walton* case, *supra,* would require a decision in its favor since, under Massachusetts law, the issuance of a summons marks the commencement of a suit. But the reasoning of the court in the *Walton* case would not require a different decision in the instant case because of the inherent difference in legal effect of the mere filing of a petition with the clerk of the District Court under the Tucker Act, *supra,* and the issuance of a summons under Massachusetts law. Even under Massachusetts law the suit is not counted as begun until machinery for notification of the defendants has been set in motion. "The office of a summons and a complaint are too variant to admit of the one doing the service of the other. The complaint is but a vehicle, construed by law to convey to the defendant, *in extenso*, the nature of the grievance laid against him, while the summons performs the function of imparting notice of the limitation of the time in which the charge is to be met by appropriate legal action." *Hooper* v. *Hooper,* 67 Ore. 187, 189–190. Cf. *Wilson* v. *Winchester & P. R. Co.,* 82 Fed. 15 (C. C. W. Va.), affirmed, 99 Fed. 642 (C. C. A. 4th). It may be that the court in the *Walton* case would have balked at the application of State law had it required the result that the jurisdictional requirements of the Tucker Act could be met without timely notice to the officers of the United States that the suit had been brought.

The petitioner also suggests (Br. 6–7) that a decision of the question here involved is necessary to supplement the decision of this Court in the case of *Munro* v. *United States,* No. 218, present term, now awaiting decision. The questions presented in the two cases are, however, entirely different. In the *Munro* case, *supra,* the petitioner sought to bring an action against the United States in accordance with the New York Civil Practice Act by causing a summons to be issued by the District Court to the United States Attorney and a copy to be mailed to the Attorney General. He failed to comply with the provisions of Sections 5 and 6 of the Tucker Act, *supra,* and the substance of his argument is that under the Conformity Act, c. 255, 17 Stat. 196 (Revised Statutes, Section 914), his suit was properly brought. That case involves the question whether suit can be brought against the United States without proceeding in accordance with the Tucker Act, while the only question presented in this case, which was brought in accordance with the Tucker Act, is whether service of the petition upon the United States Attorney must be made in accordance with the Act prior to expiration of the period for bringing suit.

The final reason advanced in support of the petition is that the decision of the court below is erroneous. We submit, however, that the decision is correct, and is fully supported by the law and the authorities relied upon in the majority opinion below.

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions, and the question presented is not of sufficient general importance to justify review by this Court. It is, therefore, respectfully submitted that the petition for writ of certiorari should be denied.

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JANUARY, 1938

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